NO. 72-1125

IN THE

Supreme Court of the United States

October Term, 1972

A. Y. ALLEE, ET AL, *Appellants*

v.

FRANCISCO MEDRANO, ET AL, *Appellees*

On Direct Appeal From The United States District Court, Southern District of Texas, Brownsville Division

BRIEF FOR THE APPELLEES

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SUBJECT INDEX

INDEX OF AUTHORITIES

CASES

CASES

STATUTES

ARTICLE

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BRIEF FOR THE APPELLEES

This appeal has been perfected by only five of the original defendants, Texas Rangers A. Y. Allee, Jack Van Cleve, Jerome Preiss, T. H. Dawson, and S. H. Denson. The judgment has become final as to the five other defendants who are the Sheriff and two Deputy Sheriffs of Starr County, Texas, Jim Rochester, a Special Deputy of the Sheriff's Department, and B. S. Lopez, a Justice of the Peace.

PRELIMINARY STATEMENT

Appellants' brief, like the Jurisdictional Statement before it, makes no challenge under Rule 52 F.R.C.P. or other reference to the fact findings of the district court. These unchallenged fact findings are found in the Appendix to the Jurisdictional Statement. We refer to these findings by the designation JS App. ____. (References to the Single Appendix printed for this case are designated App. ____.)

Appellants' brief presents a version of the evidence which is inconsistent with the express fact findings or the reasonable inferences which flow from such findings. Much of it is completely alien to the record.

In a few words, the district court found that the ten defendant law officers engaged in a year-long conspiracy to take sides in a labor-management controversy, to prevent the success of the union's organizing effort, to restrain the supporters of the organizing drive from exercising their rights under the Constitution of the United States, and to exhibit their personal bias and opinions against the strikers and their cause (JS App. 49-51). The methods used were arrests and detentions without the filing of charges, dispersals of pickets and demonstrators, threats of future prosecutions if union activities did not cease, abuse of the bonding process, and inducements by defendant peace officers to strikers to return to work, all of which, the district court found, constituted a "pattern of action" designed to halt the strike and to discourage attempts to engage in constitutionally protected conduct in support of the strike (JS App. 51). Further, as a part of this pattern the defendants instituted prosecutions in bad faith and for the purpose of harassment (JS App. 55). Under this pressure the union's efforts

collapsed in June of 1967, and this suit was filed in an effort to seek relief (JS App. 51-52).

An integral part of this official lawlessness was the infliction of serious physical violence by the defendant law officers upon the persons of union supporters (JS App. 45-46; 47-49).

A further element of this conspiracy, the district court found, was the employment of the challenged statutes for the bad faith arrests and prosecutions of plaintiffs. The district court concluded that the requirements of *Younger v. Harris,* 401 U.S. 37 (1971), and its companion cases were well satisfied and that irreparable injury was demonstrated also by the fact that defendants prevented plaintiffs from defending their conduct effectively by such additional means as the dispersal of union supporters under threats of arrest, by arrests without charges, by the filing of numerous charges, by the supporting of a private anti-union newspaper, and by threats to union supporters who were in custody or who were seeking to file their own charges, or who were engaged in picketing, or who, sometimes, were engaged in no activity whatsoever (J.S. App. 55). The district court's careful analysis and application of the *Younger v. Harris* tests is at J.S. App. 51-55.

QUESTIONS PRESENTED

1. Whether the district court's findings, which are not challenged as "clearly erroneous" by appellants, that defendants had engaged in bad-faith prosecution and harassment of plaintiffs to discourage the exercise of their constitutional rights were sufficient under *Younger v. Harris,* 401 U.S. 37, to justify the limited injunction entered against the defendants?

2. Whether the Texas statutes which the district court found to be the basis of the bad-faith prosecutions brought by defendants are unconstitutional?

The challenged statutes are four: (1) Mass Picketing, (2) Unlawful Assembly, (3) Abusive Language, and (4) Secondary Picketing, Striking, and Boycott.

The district court declared the Texas Disturbing the Peace statute unconstitutional, but no appeal has been taken from this decision.

The district court upheld the constitutionality of Article 784 of the Texas Penal Code which prohibits obstructing public streets.

SUMMARY OF THE ARGUMENT

The Statement of the Case under the topic "The Harassment Facts," pp. 10-20, *infra,* collates the detailed fact findings of the district court and presents also some cumulative undisputed evidence. It serves to demonstrate the bad-faith use of the challenged statutes to disperse, arrest, and prosecute plaintiffs as an integral part of the official lawlessness directed toward plaintiffs.

The Argument under Topic 1, "*Younger v. Harris* Tests are Satisfied," pp. 20-23, *infra,* callates the many facts and circumstances which constitute irreparable harm to plaintiffs not redressible by the defense of pending cases. We show that the district court carefully and correctly applied the *Younger v. Harris* tests before proceeding to limited injunctive relief and declaratory judgment.

The Argument under Topic 2, "Factual and Legal Setting of the Application of the Challenged Statutes," pp. 23-29, *infra,* develops these points:

1. The challenged statutes aim directly at pure speech (Abusive Language), pure assembly (Unlawful Assembly), or regulate the place and manner of expression and cumulative conduct (Mass Picketing), or prohibit picketing and related inducements in labor disputes (Secondary Picketing, Striking and Boycott).

2. Since it was stipulated and clearly demonstrated that plaintiffs' program and objectives were strictly in accord with Texas public policy, plaintiffs' activities were protected by the First Amendment if peacefully conducted. Plaintiffs were in fact repeatedly arrested and charged while engaged in constitutionally protected conduct. Each challenged statute was in fact applied to disrupt First Amendment speech and assembly.

3. The physical scene of the labor dispute was the rural area of South Texas. The usual traffic problems were absent. The employers are large growers who employ hundreds of employees.

4. Each of the many repeated arrests or dispersals was under authority of only a single one of the challenged statutes, but all of them could have been applied on each occasion to plaintiffs' constitutionally protected activities as the Attorney General demonstrated to the court below.

The Argument under Topic 3, "Mass Picketing Statute," pp. 29-36, *infra*, shows that the term is a mere label. The statute requires the spacing of pickets at 2 every 50 feet in all circumstances. The statute also applies only to pickets stationed by an organization but not to others who stand closer than two every 50 feet. It also applies regardless of actual obstruction, reasonable or unreasonable. The formula is entirely unreasonable under the

principles stated in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). It is also discriminatory. *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

Under Topic 4, "Unlawful Assembly Statute," pp. 36-40, *infra*, the unconstitutionality of the state is demonstrated under authority of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Texas statute prohibits a meeting of three or more persons with intent to aid each other "by violence *or in any other manner*" to commit an offense, illegally deprive anyone of any right, or to "disturb" anyone in the enjoyment of any of his rights.

Under Topic 5, "Abusive Language Statute," pp.40-42, *infra*, the unconstitutionality of the statute is demonstrated under *Gooding v. Wilson*, 405 U.S. 518 (1972). The Texas statute is identical to the one in *Gooding*.

Under Topic 6, "Secondary Strike and Boycott Statute," pp. 42-56, *infra*, it is demonstrated how decisions of the Texas courts have invalidated the statute and how defendant officers nevertheless utilized it to arrest plaintiffs for conduct plainly identified by the Texas Supreme Court to be constitutionally privileged. The Texas Supreme Court after rejecting the statutory tests has pronounced other and different common law tests of secondary boycott which are now effective in Texas, and these are enforceable in the equity court according to a balancing formula designed by the Texas Court. These Texas cases demonstrate that the state courts have elected not to limit the literal terms of the statute by judicial gloss or by plastic surgery but have accepted its overbroad language to be fatal. As so construed the statute is unconstitutional under the principles of *International Brotherhood of Teamsters*

v. Vogt, 354 U.S. 284 (1957). The judgment of the district court does not change or affect existing Texas laws. Rather, it terminates improper arrests under an invalid and obsolete statute.

STATEMENT OF THE CASE

1. The Judgment Below

The judgment below does not enjoin pending state prosecutions. Nor does it enjoin future application of these statutes at the hands of state authorities other than the specific 10 peace officers who deliberately misused the challenged statutes to effectuate their conspiracy with private parties.

Narrowly drawn in on paragraph (App. 100-101), the injunction order is specifically "directed to" the five named Texas Rangers (one Captain and four Privates), the Sheriff of Starr County, Texas, and his two named deputies, and their agents, employees, successors in office, and persons in active concert with them (App. 95-96) and the two other named persons. This group is ordered not to enforce the challenged statutes against Plaintiffs and their supporters by ". . . arresting, imprisoning, filing criminal charges, threatening to arrest, or ordering or advising or suggesting that they disperse under authority of . . . such statutes. (App. 100-101)

Thus, carefully matched to the specific evils encountered, the injunction leaves the Attorney General of Texas, prosecutorial officials and private parties free to litigate under the statutes either in the pending prosecutions or in new cases. Authoritative state court constructions to save the statutes' constitutionality by defining their proper application can be obtained anytime

state officials desire. Of course, other peace officers all over Texas are not covered by the injunction and may utilize the statutes as they see fit.

The main thrust of the final judgment is to render declaratory judgment as prayed for under the Declaratory Judgment Act, 28 U.S.C.A. 2201 and 2202, and to render injunctive relief as prayed for under the Civil Rights Acts, 42 U.S.C.A., §1983 and §1985 on account of the adjudicated conspiracy of the defendants to deprive plaintiffs of their civil rights, privileges and immunities protected by the Constitution of the United States by acts under color of state law.

There is no challenge on this appeal to the injunctive relief against the official lawlessness found to exist and adjudicated to be in violation of the Civil Rights Acts. (App. 72; 101-102). The conspiracy facts under these acts and the harassment facts under *Younger v. Harris* requirements turn out to be the same in this case.

The Supreme Court is respectfully advised that the preservation of this unchallenged part of the judgment below is of highest importance to these Appellees who have been terrorized enough by the law officers.

2. Legal and Economic Background

The federal statute does not cover farm workers because the definition of "employee" in 29 U.S.C.A., §152, contains the proviso that the term "shall not include any individual employed as an agricultural laborer. . . ."

Article 5153 of Vernon's Annotated Texas Statutes provides that it shall be lawful for any member of a union or other organization to induce or attempt to induce by peaceful and lawful means any person to accept any

particular employment, or enter or refuse to enter any pursuit, or to quit or relinquish any particular employment (Appendix, *infra*, p. 57). Article 5207a, §1, guarantees the right of every person to bargain individually or collectively with his employer (Appendix, *infra*, p. 57). Article 5154b prohibits picketing or striking in breach of a labor contract. (Appendix, *infra*, p. 57)

Under these Texas statutes the right to organize an association of farm workers, the right to appeal to employees to quit any particular employment or to refuse to enter upon it, and the right to seek collective or individual bargaining are entirely consistent with state policy. This was stipulated. (App. 24).

However, an employer is under no statutory duty to recognize a union selected by his employees and has no duty to bargain for a labor contract. *Flenoy v. Yarbrough*, 318 S.W.2d 15, writ ref., n.r.e. An employer may recognize a union as a representative of one, several, or all of his employees if he desires to do so, or he may fight economically and may defeat union organization by replacing strikers, or by other lawful means. In short, Texas law looks to the survival of the fittest economically.

In this case it was stipulated that the ultimate objective of the farm workers was in keeping with the public policy of the State. Indeed, their efforts to solicit support were exactly the last resort that Texas statutes contemplate in view of employer resistance to union organization. (App. 24).

Starr County, Texas, one of the poorest in the nation economically (App. 22-24), is located deep in the Rio Grande Valley. This labor dispute involved several large growers which are shown by the record to cultivate thou-

sands of acres with hundreds of farm workers employed during harvest seasons of the year. Largely these farm workers are of Latin-American extraction of both U.S. and Mexican residence and citizenship. A substantial part of the labor force is transported to the farms in bus loads. (App. 369).

3. The Harassment Facts

Regardless of the broad experience of the Justices of this Court, we think Your Honors have not seen a case like this.

The district court found that the farm workers in Starr County attempted for one full year, June 1, 1966 to June 1, 1967, to exercise their rights of citizenship, but during the entire year they were systematically set upon, threatened, dispersed, arrested, jailed, detained, manhandled and even beaten. Throughout, the law officers intertwined their enforcement of these unconstitutional statutes. The district court's findings of fact are set out at J.S. App. pp. 34-55.

Substantially as found by the district court, the farm workers' travail was this:

Union organization started June 1, 1966. Within one week, on June 8, 1966, Eugene Nelson, a union leader, was stopped from soliciting the support of agricultural workers at the Roma International Bridge, arrested without warrant or charge, jailed for several hours in the county jail of Starr County, counseled in a menacing way by the county attorney, then released without charge. (J.S. App. 38-39).

As union organization developed in the summer of 1966, the Sheriff's office commenced the distribution of a

"violently" anti-union weekly newspaper, *La Verdad.* Weekly, Deputy Sheriffs went to the bus station in official cars to pick up these newspapers, took them to the Sheriff's office and prepared them for distribution to the public, including house-to-house distribution by deputy sheriffs. The district court attached copies of *La Verdad* to its opinion. The headlines said: "ONLY MEXICAN SUBVERSIVE GROUP COULD SYMPATHIZE WITH VALLEY FARM WORKERS," UNION LEADERS IN VALLEY ARE VAGRANTS," and "GOVERNOR CONNALLY SHOULD DO SOMETHING ABOUT VALLEY STRIKE." The Supreme Court will please bear in mind that the deputy sheriff distributors of these weekly newspapers were the law officers who administered the statutes here challenged. (J.S. App. 49).

On October 12, 1966, about 25 farm workers appeared on U. S. Highway 83 adjacent to the Rancho Grande Farms to solicit support of the workers in the fields. Deputy Sheriff Raul Pena dispersed these persons by threatening to arrest them for disturbing the peace in violation of Article 474. The farm workers did disperse under this threat, but William Chandler was arrested and charged with disturbing the peace when he told Pena that he had no right to order these people to disperse. Although Pena testified that Chandler and the others were using abusive and vulgar language, Pena's signed complaint against Chandler shows that the words "obscene language, vulgar language, indecent language, swearing and cursing, yelling and shrieking, exposing the person, and rudely displaying a weapon" had been scratched out of the printed form leaving only the charge of using "loud and vociferous language." The district court concluded from the evidence that the union supporters were engaged in peaceful picket-

ing along the highway right of way when ordered to disperse. (JS App. 39) After being arrested by Pena, Chandler was jailed and placed under $500 bond, although the maximum fine for the offense was $200. When two union supporters went to the courthouse to make bond for Chandler, a deputy sheriff cursed them and told them that if they did not leave the courthouse they, too, would be jailed. (JS App. 39-40)

On October 24, 1966, Domingo Arrendo, then under arrest, uttered the words "Viva La Huelga" (long live the strike) in the courthouse, whereupon a deputy sheriff slapped him and put a cocked pistol to his head. The deputy ordered him not to utter those words in the courthouse again. (J.S. App. 40).

On November 9, 1966, defendant Deputy Sheriff Roberto Pena filed criminal charges of aiding and abetting a "Secondary Strike" under Article 5154f against 10 union supporters on account of their picketing at the packing shed of La Casita Farms on November 3. The La Casita shed is located about 30 feet from the public highway where the picketing occurred. (App. 341; Pl. Ex. 7.24A; Pl. Ex. 7.5a; Pl. Ex. 7.5B; Pl. Ex. 7.5C; Pl. Ex. 7.5D)

Texas Rangers were called from afar to serve the warrants of arrest on the ten persons. Two Texas Rangers, Frank Harger and Jerome Preiss, arrested two union members and put them in the police car. In the car the Rangers told the two farm workers that they could go to work for La Casita Farms for $1.25 an hour (the union objective), that later they could get a more peaceful union, and that the Rangers were there to break the strike and would not leave until they had done so. This

was aptly described by the district court as selective law enforcement. (JS App. 40-41)

We invite the Court's attention to the manipulation of the Texas statute in these November 9 charges. Article 5154f renders either picketing or striking "secondary" (and thus illegal) if not part of a "labor dispute." In turn, a "labor dispute" is limited to a controversy between an employer and a majority of his employees.

Texas courts have long since declared the "secondary picketing" phrase of Article 5154f to be unconstitutional since simple primary picketing by a minority of employees which violates no public policy of the State is constitutionally privileged. *Ex Parte Henry,* 215 S.W.2d 588; I.U.O.E. v. Cox, 219 S.W.2d 787; *General Labor Union v. Stephenson,* 225 S.W.2d 958. Notwithstanding the constitutionally privileged character of this primary picketing at the packing sheds, the November 9th charges presented an ingenious new angle. The pickets, the charges alleged, did "aid and abet" a "secondary strike" when the engineer and fireman of the Missouri Pacific Railroad declined to cross the picket line to go to the packing shed. After all, the engineer and the fireman were certainly less than a majority of the railroad's employees, and, therefore, the picketers, by picketing, aided and abetted them in a "secondary strike." This was a cute way around the cited *Henry, Cox* and *Stephenson* decisions and furnished a pretext for the arrest of union adherents for peaceful and privileged primary picketing. Article 5154f provides a penalty up to six months in jail for its violation. Of course, these charges have never been set for trial in the intervening seven years.

This performance was repeated by the defendant law officers on June 1, 1967, when three farm workers were

arrested for picketing at the same place. (Pl. Ex. 7.24C; App. 336-342).

These object lessons could hardly be misunderstood by the union sympathizers. If they could be prosecuted for "aiding and abetting a secondary strike" while lawfully picketing at the public road 30 feet away from La Casita Farms' shed, then picketing, however lawful as to the growers, would subject them to arrest wherever done.

On January 26, 1967, five union sympathizers were arrested on the banks of the Rio Grande River while soliciting the employees of Trophy Farms to join the union. The charge this time was Abusive Language in violation of Article 482 in that they did curse or abuse or used violently abusive language toward the workers under circumstances reasonably calculated to provoke a breach of the peace. That evening approximately 20 union supporters gathered at the courthouse to conduct a prayer vigil. Two members of the group, Reverend James Drake and Gilbert Padilla, mounted the courthouse steps and engaged in prayer. Deputy Sheriff Raul Pena ordered the group to leave the courthouse grounds and they did so, but Drake and Padilla remained on the steps. The deputy thereupon arrested them for Unlawful Assembly in violation of Article 439. (JS App. 41-42)

No Texas statute prohibits the presence of this group on courthouse grounds. By stipulation it was established that the courthouse grounds had been used in the past for night rallies and dances by custom and practice in the particular county. The court below found this to be one of the several episodes of selective enforcement by the defendants. (JS App. 42)

Although stipulation and evidence established that orchestras and record players had played loudly at night on the very courthouse steps where Drake and Padilla prayed quietly (App. 164; 166; 628), and that courthouse grounds had been used by political parties to erect tents, the Unlawful Assembly criminal complaint alleged that Drake and Padilla disturbed the night custodian of the courthouse. (App. 79)

On February 1, 1967, two Catholic priests, Father Smith and Father Killian, and three other priests, assembled in a wooded area on private property owned by one Thomas Bazan adjacent to the property of La Casita Farms. The five priests solicited the workers in the fields to join the Union. They were promptly arrested for Disturbing the Peace and taken to a magistrate. (JS App. 42-43)

There the magistrate, B. S. Lopez, Justice of the Peace, informed the priests that if they were ever brought into the same court under the same charge they would be put under a peace bond, and if they couldn't meet the bond, they would be put in jail. Relative to these arrests the Attorney General of Texas made the following statement before the three judge court. He said in Defendants' Post Hearing Brief:

> "Based on the testimony of the two Catholic priests, Father Smith and Father Killian, everyone present could have been charged with the violation of Article 5154d, mass picketing, with Articles 439 and 449, unlawful assembly, and possibly under Article 482, abusive language, as Father Smith stated that they were calling the workers 'scab' in Spanish in attempting to use the word that has 'punch to it and an edge on it.'" (Appendix, *infra*, p. 58.)

As of May 11, 1967, the farm workers had developed important support on the Mexican side. As a result, on that day no Mexican farm workers came across the Rio Grande river to do work for the growers. (App. 203) This development triggered intense activity on the part of Texas Rangers.

On the morning of May 11, 1967, a group of farm workers supporters left Roma Bridge headed south for the Camargo Bridge. On the way their car was stopped by a Texas Ranger. The driver of the car was arrested for not having a driver's license. On the same day, Ranger Captain Allee solicited union adherents to go to work for $1.25 per hour. (JS App. 43)

On May 12, 1967, Texas Rangers received a complaint from La Casita Farms that the union people were on private property owned by one Solis adjacent to the property of La Casita. The Texas Rangers promptly went to the scene of the solicitation. First they made investigation whether the union supporters had permission from Mr. Solis to be on his private property. Then the Texas Rangers caused the pickets to spread out 50 feet apart. Reverend Edward Krueger, a union sympathizer, stepped off the distance to comply with the Rangers' instructions. All this took place in the woods. (JS App. 43-44; App. 796)

Later that day, May 12, Eugene Nelson went to the Sheriff's office to complain that the Texas Rangers were acting as a private police force for La Casita Farms. As a result, Nelson was arrested and charged with threatening the life of certain Texas Rangers. Defendant, Captain Allee, testified that he did not take the "threat" seriously, he directed that charges be filed against Nelson

in order to protect the Texas Rangers from criticism if something happened to Nelson. After Nelson was jailed on this charge, the Sheriff's deputies unlawfully refused to accept a tendered appearance bond although they knew that the bond was signed by a prominent landowner in Starr County, one Joseph Guerra. (JS App. 44) The Texas Rangers who arrested Nelson on this charge told him that he had lived a charmed life in Starr County long enough and warned him not to go too near the river or he might end up floating down. (App. 122-123)

On May 18, 1967, a group of about 22 Pickets assembled at the side of U. S. Highway 83 to solicit support from workers in the fields of Trophy Farms. Defendant Ranger Captain A. Y. Allee testified that he was called to the scene by a Trophy Farms official, and when he arrived he found 10 or 12 pickets on the side of the road "all in a bunch" (but not near the Trophy Farms gate). He thereupon arrested them since they were bunched up. (App. 797-799) The Ranger Captain testified that he administered the Mass Picketing statute in this way, that is, persons "bunched up" within 50 feet of each other were arrested. (App. 847)

On May 26, 1967, 14 pickets were arrested in two groups at Mission, Texas. They were charged with Unlawful Assembly (Pl. Ex. 720A) and later with Secondary Picketing and Boycott (Pl. Ex. 720B; 720C). The first group of 10 persons were arrested when they allegedly attempted to picket a train which carried produce. After the first 10 had been taken to jail, 4 others not present at the first arrest were likewise arrested and charged with Unlawful Assembly and then Secondary Picketing and Boycotting. The latter 4 were Reverend Edgar Krueger, his wife Magdaleno Dimas, and Douglas Adair. The dis-

trict court found that although the evidence was disputed as to whether the first 10 arrests were justified under the circumstances, it is clear that the second arrests were not. The district court also found that the persons arrested were roughly handled by the Rangers, and Reverend Krueger was advised that he should stop his picketing and strike activities since these were not consistent with his ministerial functions. (JS App. 44-46)

As to the first arrests, the defendant Rangers testified that the pickets were standing at the intersection of the main street of Mission, Texas, with the railroad tracks and thus were in position to physically block the train. As to the second group of four, the district court found that Reverend Krueger was arrested "at best" because he had asked to be arrested. Also, Reverend Krueger had been urging bystanders to resume picketing (after the train had passed) according to the Rangers. The district court also found that Mrs. Krueger was arrested either for taking a picture of her husband's arrest or attempting to strike defendant Ranger Captain Allee with her camera in defense of her husband. The district court found that none of the four had picket signs, or were picketing, or were physically blocking the railroad tracks. They were trying unsuccessfully to encourage bystanders to picket according to the Rangers. (JS App. 45-46) All four of them were booked at the jail for Unlawful Assembly. (App. 925-926).

The district court also found that the defendant Rangers arrested Reverend Krueger and Magdaleno Dimas and then took them to a passing train where they held the prisoners' bodies and faces only inches from the passing train. (JS App. 45)

On May 31, 1967, the Rangers arrested 13 persons for mass picketing in the woods at the west periphery of La Casita Farms. Ranger Captain Allee testified that he arrested these persons because they were gathered together in a group and thus were picketing in a forbidden manner in his sight and presence. Three of the pickets had moved southward along a country road to follow the work force as it moved through the field, but the other eight who were bothered by the heat waited with their cars under the shade of some trees with their signs put away. Captain Allee arrested the first three pickets and then directed that the eight others under the tree likewise be arrested for mass picketing. After all, they were bunched up under the tree. (J.S. 46-47)

On the night of June 1, 1967, Ranger Captain Allee with gun in hand conducted in Rio Grande City, Texas a conspicuous and terrifying man hunt for Magdaleno Dimas, a union supporter. The man hunt led to a private residence which Texas Rangers surrounded, then broke into after calling out the Justice of the Peace to issue a curbside search warrant. After breaking in, they administered a severe and merciless beating to Dimas and another. (J.S. App. 47-49)

The man hunt was conducted without known reason, without charges, and without warrant, but after Dimas was jailed, an official of La Casita Farms, defendant Jim Rochester, was called out in the night to file justifying charges. Dimas was charged with disturbing the peace at La Casita Farm Shed No. 1 by yelling, "Viva La Huelga." (Long live the strike). (Pl. Exhibit 7. 22D) and by rudely displaying a deadly weapon. (Pl. Exhibit 7. 22C). Other evidence established that during the daylight hours of the same day, Dimas had walked along the highway past La

Casita's packing shed with a hunting rifle in hand, returning from a bird hunt. (J.S. App. 47-49)

Also on June 1st three more union supporters picketing at the La Casita shed were arrested for mass picketing and secondary boycott. The charge of mass picketing was filed because they were three in number. The secondary boycott resulted from the fact the pickets were near the premises of the Missouri Pacific Railroad (the tracks which enter La Casita's shed), an employer which had no labor dispute with its employees. (Pl. Ex. 7.24B, 7.24C; App. 336-342)

Under this pressure, the Union's effort collapsed. So, on June 1, 1967, the Union announced that it would discontinue its organizing efforts and seek relief from the courts. This suit followed promptly. (J.S. App. 51-52)

All the above facts and many others were proved to the district court which was unanimous in making uncommonly strong fact findings. The evidence showed 8 cases of overt official partiality, 5 cases of manhandling by officers, 7 cases of unwarranted prosecution, 3 cases of bonding abuses, and 56 arrests for First Amendment activity, plus numerous dispersals of persons or interference with them where no charges were filed. Physical brutality was administered to at least 5 union leaders.

None of the pending prosecutions has ever been set for trial.

ARGUMENT

1. Younger v. Harris Tests are Satisfied.

The court below was clearly right that *Younger v. Harris* tests are satisfied and that injunctive and other

relief is appropriate. The argument of the Attorney General to the contrary is based upon his own recitation of claims that are apart from the fact findings and at war with the credited evidence. The district court's review of the harassment facts is at J.S. App. 34-35.

The district court's analysis of the record in light of *Younger* (J.S. App. 51-55) starts out with recognition that if the only danger to plaintiffs, real or imagined, is "chilling" of free expression incidental to the good faith prosecution of violations of state penal provisions (even unconstitutional statutes), *Younger* is not satisfied (J.S. App. 51).

The district court then proceeded to find irreparable injury in addition to bad-faith prosecution:

> "The arrests, detentions without the filing of charges, seizures of signs, dispersals of pickets and demonstrators, the threats of further prosecutions if pro-union activities did not cease, the abuse of the bonding process, and the inducements offered by peace officers to strikers to return to work, disclose a pattern of action by local authorities designed to halt the strike and to discourage attempts to engage in constitutionally protected conduct in support of the strike. The union's efforts collapsed under this pressure in June of 1967 and this suit was filed in an effort to seek relief. Since that time the union has not engaged in organizational activities. To the extent that the farm workers were forced to abandon activity to better their lot which is protected by the First Amendment they have endured irreparable harm." (J.S. App. 51-52).
>
> * * *
>
> "Here, we find that these plaintiffs have met both of these tests in that they have established the existence of bad faith prosecutions as well as irreparable

injury to their own federally protected rights and those of their class. The bad faith on the part of the local authorities can be seen in facts set out above in Part II and in the discussion of 'irreparable injury' in this part. The authorities have prevented the plaintiffs from defending their conduct by causing crowds to be dispersed under threats of arrest, by arresting persons and then releasing them without filing charges, by abusing the bond system, by filing numerous charges against the plaintiffs, by refusing to file complaints made by the plaintiffs, by supporting a private anti-union newspaper, by the comments and threats made to union supporters in custody, union supporters seeking to file charges, union supporters on picket lines, and union supporters engaging in no activity whatsoever, and all for the purpose of breaking up the strike and preventing persons from advocating support for the strike and its principles. The policy authorities were openly hostile to the strike and individual strikers, and used their law enforcement powers to suppress the farm workers' strike." (J.S. App. 55.)

If this case does not satisfy *Younger*, no case can.

The Attorney General's indifference to the fact findings and to the official lawlessness behind them is fresh evidence that some of our state officials still do not wish to shoulder responsibility for the control of ugly law enforcement. The alleged misconduct attributed to farm workers is made practically from the whole cloth. Indeed, the district court found at J.S. App. p. 50 that the strongest evidence of an assault on anyone by the farm workers during the entire year was an attempt by one of them to reach through an open window of a passing truck to grab a nonstriker by the coat on December 28, 1966. Although it was claimed that property destruction and the burning

of a railroad bridge resulted from the strike, no evidence was presented specifically in this respect, and the district court so found. (J.S. App. 37-38)

Without purporting to whitewash the activities of the farm workers and their sympathizers, the district court found that the law officers stepped over the line of neutral law enforcement and entered the controversy on the employers' side. The law officers were found to have deliberately intended to break the strike and to prevent persons from supporting it by using their law enforcement powers to this end by instituting these prosecutions in bad faith and for the purpose of harassment (J.S. App. 51; 55)

2. Factual and Legal Setting of the Use of the Challenged Statutes.

Two of the challenged statutes are directed squarely at pure speech and pure assembly. These are Article 482, Abusive Language, and Article 439, Unlawful Assembly.

The mass picketing statute purports to regulate the place and manner of expression and of communicative conduct. Although its title refers to "picketing," its terms also apply to any form of "inducing or attempting to induce" and to efforts to "persuade."

Article 5154f, the secondary picketing, strike, and boycott statute, regulates communicative conduct as well as other conduct, as will be discussed hereafter.

We start out with the clearly demonstrated and stipulated legality under Texas law of plaintiffs' efforts to induce farm worker employees of the various growers to quit their employment and to make common cause with the union. Article 5153 of Vernon's Annotated Texas Statutes, Appendix, *infa*, p. 57, specifies that "It shall

be lawful" for union members "to induce or attempt to induce" by peaceful and lawful means any person "to refuse to enter any pursuit or to quit or relinquish any employment or pursuit in which such person may then be engaged."

The employer growers in this case exercised fully their right to induce employees to reject the union and continue to work. Clearly, then, in this ideological and economic contest the union and its supporters were entitled to use the full measure of their persuasive powers and organizational techniques so long as they did so peacefully and without threats or physical obstruction. Since they violated no state policy by their efforts, it is also clear that they were protected by the First Amendment in both speech and assembly.

The physical scene of this contest was the rural area of South Texas. The great farming operations conducted by the growers were substantial in size employing hundreds of farm workers especially during planting and harvesting periods. These farm workers were to a large extent hauled in from distant places by bus loads according to the stipulation. We do not have in this case the usual traffic problems of urban settings, nor sidewalks, nor narrow streets, nor other constricted locations which underpin a state interest in maintaining the free flow of pedestrian or automobile traffic in limited space.

Also, this case does not present excessively large gatherings of farm workers. The largest grouping disclosed by the evidence was composed of the 22 persons arrested on May 18, 1967, as they stood at the side of U.S. Highway 83. In this instance the testimony of the very arresting officer, defendant Ranger Captain Allee, established that these persons were located at the side

of the road, not near the Trophy Farms gate, and that these people were arrested solely because they stood around "all in a bunch." (App. 797-799; 847) It is a fair statement that the farm workers' assemblages were moderate in size and small, indeed, in comparison to the work force to which they directed their lawful inducements.

The district court found open hostility toward the union and partiality toward the growers on the part of the defendant peace officers who utilized threats, physical violence, and open anti-union solicitation along with their administration of the statutes challenged in this case. It was entirely natural and easy for the peace officers to use one or the other of the challenged statutes to supplement their partisan program by finding more than two persons standing within 50 feet of each other or by concluding that the union members' solicitations were either "loud and vociferous" or "foul" or they "disturbed" some other person in the exercise of his rights.

In every case, the selection of a particular statute as authority to arrest was entirely optional with the law officers. In fact, the Attorney General's Post Hearing Brief, parts of which are reproduced in the Single Appendix lodged in this Court, outlines the officers' options on each occasion as they arrested the farm workers.

The Attorney General advised the court:

1. As to October 12, 1966, when 25 farm workers were dispersed on U.S. Highway 83 adjacent to the Rancho Grande Farms, and William Chandler was arrested for disturbing the peace in violation of Article 474

> "All persons present could have been charged with violation of Article 482, Abusive Language, viola-

tion of Articles 434 and 449, Unlawful Assembly. If charges had been under Articles 455, 464, 466 and under Article 468, all persons present would have been guilty of rioting as all would be guilty if anyone present performed an illegal act."

(Appendix, *infra*, pp. 57-58.)

2. As to January 26, 1967, when five union sympathizers were arrested for using abusive language on the banks of the Rio Grande River while soliciting employees of Trophy Farms to join the union

"... Plaintiffs could clearly have been charged under Article 482, Abusive Language; 439, 449, Unlawful Assembly; 455, 464, 466, 469, rioting statutes; and 5154(d), V.C.S. [mass picketing]."

(Appendix, *infra*, p. 58.)

3. As to January 26, 1967, when Reverend James Drake and Gilbert Padilla were arrested for Unlawful Assembly on account of praying on the courthouse steps, the Attorney General advised the court that:

"... the entire crowd could have been arrested and charged with unlawful assembly under the P.C., Articles 439, 449; for Rioting, P.C., Articles 455, 466, for Disturbing the Peace, P.C., Article 482, Abusive Language."

(Appendix, *infra*, p. 58.)

4. As to February 1, 1966, when five Catholic priests were arrested for disturbing the peace because of standing on the Bazan property and soliciting La Casita workers to join the union, the Attorney General advised the court that:

". . . everyone present could have been charged with violation of Article 5154(d), Mass Picketing, with Articles 439 and 449, Unlawful Assembly; and possibly under Article 482, Abusive Language, as Father Smith stated that they were calling the workers 'scab' in Spanish in attempting to use the word that has 'punch to it and an edge to it.'"

(Appendix, *infra*, p. 58.)

5. As to May 11, 1967, when Ismael Diaz was arrested for not having a driver's license, the Attorney General, noting a Ranger's testimony that Diaz was speeding up and passing a bus containing farm workers and then slowing it down so that the bus could not proceed freely, advised the court that:

". . . A valid charge of Unlawful Assembly, Articles 439 and 449 or Rioting, Article 455 and 464 could have been filed against all persons in the car."

(Appendix, *infra*, p. 59.)

6. As to May 18, 1967, when about 22 pickets were arrested at the side of U.S. Highway 83 for mass picketing because they stood around "all in a bunch," the Attorney General advised the court that:

"Charges could have likewise been filed for rioting and unlawful assembly."

(Appendix, *infra*, p. 59.)

7. As to the arrests on May 26, 1967, of 14 pickets in 2 groups, the Attorney General advised the court that:

"At the time and place in question both those initially arrested and those arrested in the secondary

> group were clearly guilty of Unlawful Assembly under Articles 439 and 449 of the Penal Code and of Rioting under Articles 455, 464, and 466. . . . It is interesting to note that in spite of protestations of innocence, each of the persons arrested had participated in the union activity, were away from their homes with the intention of aiding and lending support to the unlawful assembly and riot at Mission, Texas. It is immaterial under State law whether or not they were actually standing on the railroad tracks themselves or merely near to the tracks or even if they were somewhere else if they were or had been a part of this unlawful assembly."

(Appendix, *infra*, p. 59.)

8. As to May 31, 1967, when 13 persons on the Solis property were arrested for mass picketing, 10 of them because they were bunched up under the shade of a tree, the Attorney General advised the court that:

> ". . . In addition on this occasion, participants could have been charged with violation of Articles 439, 449, Unlawful Assembly; Articles 474, Disturbing the Peace; and Article 482, Abusive Language, Articles 455, 464, or 466 of the rioting statute."

(Appendix, *infra*, p. 59.)

Coming as they did from the Attorney General of Texas after full trial on the merits, the foregoing comments illustrate the hapless position of the plaintiff farm workers union and its supporters. Knowing the hostility of the defendant officers and the extent of the official lawlessness to which they were willing to resort, plaintiffs had no alternative except to challenge the statutes which the defendant law officers had used because they were susceptible to misuse.

There is no element of precipitate challenge by these plaintiffs nor precipitate adjudication of facial unconstitutionality by the district court. Plaintiffs were set upon and harassed for one long year, the entire duration of their organizing effort, and were dispersed or arrested and charged (but never tried) under the statutes here challenged. Whatever hesitation the Supreme Court may feel in the average case where a declaration of facial unconstitutionality is requested, this is a case where this Court is not called upon to make judicial prediction or judicial assumption that these statutes' very existence may cause persons not before the Court to refrain from constitutionally protected speech or expression. This is a case in which it is a proven fact that these statutes in the hands of hostile law officers were actually used to frustrate constitutionally protected speech and assembly to a degree that the union's organizing efforts were crushed.

In this respect, this particular case vindicates the Supreme Court's special concern for the protection of First Amendment rights. By their manipulation of the challenged statutes and their other conduct the defendant officers deprived the plaintiffs of their power of cohesion. The right of every individual to speak and meet requires not only opportunity for him but also freedom of others to hear or join with him without fear. (J.S. App. 53)

3. Mass Picketing Statute.

Section 1 of Article 5154(d) uses the term "mass picketing," but this is another of those mere labels of state law" which tends to disguise interference with innocent First Amendment communication and association.

New York Times v. Sullivan, 376 U.S. 254, 269 (1964). Far from addressing itself to "mass" assembly of persons, it specifies that in every case persons who communicate by picketing or who assemble to induce must not "at any time" permit themselves to be closer to each other than two every fifty feet. This applies to every time and every place and without consideration of the surrounding physical conditions or the size and nature of the target operations. The statutory terms "picket" and "picketing" include every person who acts for an organization who is present for the purpose of inducement, observation, or persuasion.

This numbers and distance formula is thus not limited to those who carry picket signs but includes everyone who has a sufficient interest in the matter to be present to see what is going on.

The statute also applies its formula everywhere in the state including both public and private property, and it was so enforced in this case.

The bare fact of the physical presence of more than two persons within fifty feet violates the statute without reference to actual obstruction, whether reasonable or unreasonable, and the statute was so applied to these farm workers. Defendant Ranger Captain Allee testified that this was the policy of enforcement applicable to all cases.

Violation of the statute by any individual is punishable by a fine of $25 to $500 or imprisonment up to 90 days, or both. "Each separate act of violation shall constitute a separate offense."

True, reasonable regulations as to time, place, and manner for expressive activity are constitutionally appro-

priate even under the First Amendment, but "The nature of a place, 'the pattern of its normal activities, dictates the kinds of regulations of time, place, and manner that are reasonable.' " *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In *Grayned* this Court said:

> "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest."

We will not burden this Court with the engaging speculation as to which of three persons is the guilty one if the three are found within a space of fifty feet. This and other absurd questions realistically arise under the statute. And because of the limitless reach of the statute and its application to all interested persons in the vicinity, we have come in this case to the absurdity of the arrest of 10 farm workers as they lolled in the shade of a tree in the woods and another 22 because they were bunched up on the side of the road on U.S. Highway 83, all without reference to any actual obstruction of anyone.

Human beings are gregarious by nature. Gathering together in moderate numbers and working together cooperatively, they can and do inspire and strengthen each other and induce confidence in those whom they solicit to join. Every political candidate knows that a good crowd at a rally or in a parade will help him look like a winner. There is no rational reason of legitimate state interest why union supporters pursuing a lawful objective

of solicitation must be mandatorially spaced out in every case to satisfy this statutory formula.

In terms of the "crucial question" posed in *Grayned*, the peaceful expression of their views by these farm workers assembled in numbers of more than two every fifty feet is not basically incompatible with any legitimate protection which the growers may demand or the state may bestow. To the contrary, the imposition of the numbers and distance formula of the statute in this case debases and impairs the credibility of the union's efforts and unfairly tips the scales of persuasion against one side of the controversy.

Many other cases can be visualized where the same unfair result would follow. To be sure, cases can also be visualized where a limitation of pickets to two every fifty feet might be appropriate. The vice in this statute is its over-breadth in providing a restrictive mechanical formula to fit all situations.

The second respect in which the statute is unconstitutional is its violation of the Equal Protection Clause of the Fourteenth Amendment. The offense of mass picketing can only be committed by pickets or persons who are "stationed by or act for or in behalf of any organization." The statutory definitions of "picket" and "picketing" make it clear that persons who are not stationed by or acting for or in behalf of an "organization" may gather and picket without reference to the numbers and distance or the obstruction formula of Article 5154(d). Both the 50-foot phase and the obstruction phase of the statute incorporate these statutory definitions:

> "The term 'picket' as used in this Act shall include any persons *stationed by or acting for and in*

behalf of any organization for the purpose of inducing, or attempting to induce, anyone not to enter the premises in question or to observe the premises so as to ascertain who enters or patronizes the same . . ." etc. (Emphasis added)

"The term 'picketing,' as used in this Act, shall include the stationing or posting of one's persons or of others *for and in behalf of any organization* to induce anyone not to enter the premises in question, or to observe so as to ascertain who enters . . ." etc. (Emphasis added)

A similar distinction in the regulation of the place and manner picketing was recently declared invalid. *Police Department of City of Chicago v. Mosley,* 408 U.S. 92 (1972); *Grayned v. City of Rockford,* 408 U.S. 104 (1972). In *Mosley* the court held it to be unconstitutional under the Equal Protection Clause to outlaw all picketing within 150 feet of the school, except labor picketing. The reasoning of *Mosely* is fully applicable here. Discrimination among pickets which is based on whether they represent an organization is no more "tailored to a substantial government interest," 408 U.S. at p. 102, than discrimination based upon "the contents of their expression." *Id.* Indeed, *the* distinction which the statute draws penalizes "the right of individuals to associate to further their personal beliefs." *Healy v. James,* 408 U.S. 169, 181 (1972). Also rejected in *Mosley* was a state argument to the effect that non-labor picketing, as a class, is more prone to produce violence than labor picketing. The court responded that the Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to legitimate objectives and that abuse of picketing must be dealt

with even-handedly regardless of the subject matter of the picketing.

The constitutionality of the Article 5154(f) was challenged on this ground by plaintiffs by pleading and by pretrial memorandum. The district court did not specifically mention this phase of the case, no doubt because the decision below was handed down on the same day that the Supreme Court decided *Mosley* and *Grayned* on June 26, 1972. Nevertheless, the unconstitutionality of the statute on this ground is clear.

If the Supreme Court sustains the Equal Protection argument and the applicability of the *Grayned* and *Mosley* decisions, supra, the point is also applicable to the prohibition of "any character of obstruction" phase of the statute. Mass picketing is defined to include any form of picketing which constitutes or forms "any character of obstacle" by obstructing free ingress or egress by the persons of the pickets. The District Court construed the statute to mean "once a picket comes within the statutory definition, it does not matter whether the picketing is a reasonable or unreasonable obstacle to access, it is forbidden. The statute does not permit the courts to relax its strictures and decline to issue injunctions where picketing does not present an unreasonable barrier to access." (J.S. App. 63). On the other hand, the Attorney General, at pages 24 and 25 of Appellants' Brief, construes the statute to apply only to "actual physical obstruction." In this respect, the Attorney General says, the Texas statute is more narrow than the statute upheld by this Court in *Cameron v. Johnson,* 390 U.S. 611 (1968), which involved a Mississippi statute which prohibited picketing "in such a manner as to obstruct

or unreasonably interfere with free ingress or egress . . ." to the courthouse or other public buildings.

Appellees readily concede under the authority of *Cameron v. Johnson* that the Texas statute would not be overbroad if it were construed to prohibit obstacles which are unreasonable. Such a construction of this particular statute would probably be an excessive indulgence, however, since the statute also prohibits pickets in excess of two every 50 feet without reference to the existence of any kind of obstacle, reasonable or unreasonable, and without reference to the reasonableness of the interference which results from the presence of the pickets. It was actually so applied in this case by the arrests in the woods and on the side of a public highway.

Every street intersection is the scene of continual interference and obstruction between pedestrians and automobile drivers who momentarily obstruct each other on sidewalk and street long enough to move on. No one would term this temporary blocking to be unreasonable. Just so, peaceful pickets and persons moving in and out of picketed premises will inevitably need to accommodate for each other and momentary obstruction or trivial interference as one or the other moves out of the way is not unreasonable.

This was the exact situation before the Supreme Court in *Cameron v. Johnson,* supra. In Footnotes 1 and 4 of the dissenting opinion of Mr. Justice Fortas there is a description of this trivial interference which might occur from the presence of pickets at a point of access to premises. We understand that the Mississippi statute was upheld because it prevented "unreasonable" interference and not because Mississippi could lawfully prohibit peaceful picketing which has only trivial effect in terms of

interference. ". . . this statute does not prohibit picketing . . . unless engaged in in a manner which obstructs or unreasonably interferes with ingress or egress to or from the courthouse." 390 U.S. p. 617.

In this connection, the District Court upheld the constitutionality of Article 784 of the Texas Penal Code which prohibits obstructing public streets (J.S. App. 64-65). The court considered the word "obstruct" in that statute to mean an actual prevention or substantial interference with traffic.

The Supreme Court is respectfully referred to the four exhibits reproduced at pages 18 and 19 of Appellees' Motion to Affirm. The exhibits there show the actual rural scenes where the picketing took place in this case and where arrests were made. Exhibits 7.17F and 7.18L are pictures taken by the Texas Rangers themselves at the scene where they administered the Mass Picketing statute by arrests.

4. Unlawful Assembly Statute.

The district court's demonstration of the unconstitutionality of Texas Penal Code Article 439, the Unlawful Assembly statute, is at J.S. App. 74-77.

At pp. 33-37 of Appellant's Brief is Appellants' argument in support of this statute, which is somewhat inept because it seems to say that Article 439 cannot stand alone. It can, however, by the express provisions of Texas Penal Code Article 452 which is set out below. In any case, the district court assumed for purposes of discussion that the "right" to be protected from deprival or disturbance is one which the State may legitimately protect (J.S. App. 75).

Article 439 of the Texas Penal Code, Unlawful Assembly, provides as follows:

> An "unlawful assembly" is the meeting of three or more persons with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof.

Article 452 provides:

> If the purpose of the unlawful assembly be to effect any illegal object other than those mentioned in the preceding articles of this chapter, all persons engaged therein shall be fined not more than two hundred dollars.

This ancient statute, enacted in 1879, is not "directed to inciting or producing imminent lawless action" by advocacy but also encompasses (1) guilt by association, (2) abstract advocacy, (3) intent to aid "in any manner" the deprivation of any person of any right illegally, and (4) finally, the intent to aid in any manner the disturbance of any person in the enjoyment of any right.

The statute does not square with First Amendment protection of the right of assembly. *Brandenburg v. Ohio,* 395 U.S. 444 (1969); *Healy v. James,* 408 U.S. 169 (1972).

Texas courts have not limited the statute to hard core or lawless action. For example, in *Briscoe v. State,* 341 S.W.2d 432 (1961), the court held that the indictment should specify whether the offense involved an intent to use violence to disturb the victim or whether it involved an intent to use means other than violence to disturb the victim in his rights.

Interestingly, Appellants' Brief at page 34 makes the following statement:

> "Thus this portion of the statute makes criminal a conspiracy to do something that the law of the State, including the civil statutes and the common law, prohibits."

Literally, the statute does, indeed, define Unlawful Assembly to include an intent of three or more people to aid each other to disturb some person in the enjoyment of one of his common law rights.

Concerted peaceful activities are protected by the First Amendment even if they do "disturb" others in the enjoyment of their rights. In *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971), this Court reversed an Illinois injunction in favor of a real estate broker against irate citizens who vigorously advertised and condemned the broker's business practices in the area of "block busting." The opinion of Chief Justice Burger, 402 U.S. at 419, said:

> ". . . In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondents does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See Schneider v State, *supra;* Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Petitoners were engaged openly and vigorously in making the

> public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability."

It goes wtihout saying under this and other authority that peaceful assembly to protest or change the practices of others may not be prohibited on the sole ground that they do disturb the enjoymena of rights by these others.

In this case Reverend James Drake and Gilbert Padilla were arrested for unlawful assembly for praying on the courthouse steps on January 26, 1967. It was stipulated that the courthouse property had been used in the past for nighttime rallies of politicians and for dances. No Texas statute prohibited the presence of these men at the scene of their prayers. The disturbance of the "right" of another is easy to supply—perhaps the right of a janitor, a jailer, or an atheist enjoying his peace on the grounds.

Again on May 26, 1967, ten union sympathizers at one time and four other union sympathizers at a later time were arrested for unlawful assembly on the main street of Mission, Texas. The first group of ten had the intent to aid each other in picketing although the picketing had not started. The second group of four arrived later with the intent to aid the first ten, although the first ten had already been taken to jail. The "offense" or the "disturbance of a right" could be supplied by the Texas secondary boycott statute. That statute makes it a crime for any two persons to plan to cause injury to another "by picketing." Or, the offense could be supplied by an-

other provision of that statute which prohibits the plan of any two persons to cause injury to another by interfering with the free flow of commerce.

Again on February 1, 1967, five Catholic priests assembled in a wooded area on private property adjacent to La Casita Farms. There they solicited the workers in the field to join the union and were promptly arrested for disturbing the peace. As pointed out, the Attorney General of Texas advised the court in its post-trial memorandum that "everyone present could have been charged with the violation of Article 5154(d), mass picketing, with Articles 439 and 449, unlawful assembly, and possibly under Article 483, abusive language, as Father Smith stated that they were calling the workers 'scab' in Spanish in attempting to use the word that has punch to it and an edge on it." (See Appendix, *infra,* p. 38)

This unlawful assembly statute in addition to its overbreadth lends itself to all manner of unpredictable and selective enforcement as the Attorney General clearly demonstrated to the district court. (See pp. 25 et seq., *supra.*)

5. Abusive Language Statute.

The district court's demonstration of the unconstitutionality of Texas Penal Code Article 482 is at J.S. App. 72-74. The statute provides:

> "Any person who shall in the presence or hearing of another curse or abuse such person, or use any violently abusive language to such person concerning him or any of his female relatives, under circumstances reasonably calculated to provoke a breach of the peace shall be fined not more than one hundred dollars."

In all material respects this statute is identical to the Georgia statute in *Gooding v. Wilson,* 405 U.S. 518 (1972).

At Footnote 22 (J.S. App. p. 83) the district court reviewed Texas decisions to show that this statute has not been limited to the kind of "fighting words" contemplated by *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). Appellants' Brief does not even address itself to the cases discussed in Footnote 22 (J.S. App. 22).

The constitutional posture of these plaintiffs is far superior, however, to that of the defendant in *Gooding v. Wilson, supra.* In this case on January 26, 1967, five farm workers standing on the banks of the Rio Grande River were addressing themselves to a large number of workers in the fields by means of a loudspeaker. Deputy Sheriff Roberto Pena arrested all five for abusive language and confiscated their loudspeaker until the next day.

We do not have here the individual, face-to-face delivery of severly insulting language which *Chaplinsky* contemplates. To the contrary, there was distance and also the impersonal aspect stemming from the group attitude of the union supporters on the one hand in contrast to the group indifference or rejection of their cause by the workers on the other.

The Texas court applies the abusive language statute in cases other than direct personal abuse by one person to another of a provocative kind which will likely provoke a breach of the peace in the circumstances. In addition to the cases cited in Footnote 22 of the district court's opinion, the Texas court has held that the abusive language statute was violated when the defendant on his own premises shouted to someone in his house: "Call Mitchell,

these god damned bastards got guns." These remarks were not even addressed to the two law officers referred to who were crouched behind vehicles parked in the defendant's driveway. *Duke v. State*, 328 S.W.2d 189 (1959). Under this interpretation, the statute is violated even though the person referred to would not commit a responsive breach of the peace because of official position and responsibility. As in *Gooding v. Wilson, supra*, this leaves the standard of guilt to the creation of the trier of fact in each case.

The Texas Abusive Language Statute is a natural implement for hostile law officers to utilize oppressively in the group animosities which inhere in labor disputes. Unfriendly law officers can be quick to conclude that the persuasions, arguments and appellations of the union supporters are "abusive" to a degree which might be reasonably calculated to provoke a responsive breach of the peace by the nonstrikers. As previously pointed out, at or about the same time one of five Catholic priests used the Spanish word "esquirol" which literally means "squirrel" but is the general equivalent of the English word "scab" in the context of a labor dispute. The Attorney General expressly advised the Court that the abusive language statute was violated by the use of this word on the occasion in question. (*Supra*, p. 27.)

6. Secondary Strike and Boycott Statute.

Under Article 5154f, defendant officers performed the following arrests:

1. 10 persons arrested and charged with aiding and abetting a strike of two members of a train crew on November 3, 1966, by picketing on a public highway adjacent to a La Casita Farms shed.

2. 14 persons arrested in two groups at Mission, Texas, on May 26, 1967, and charged with secondary picketing and secondary boycott on account of picketing at the intersection of Conway Street, the main street of Mission, Texas, and a Missouri Pacific Railroad track.

3. 4 persons arrested on June 1, 1967, for secondary picketing near the intersection of the Missouri Pacific Railroad track and Conwey street in Mission, Texas.

4. 3 persons arrested on May 31, 1967, for secondary picketing on a public road adjacent to a La Casita shed (the same location as the first 10 arrests).

Article 5154f was substantially invalidated on constitutional grounds by a long series of Texas cases which culminated in the decision of the Texas Supreme Court in *Dallas General Drivers v. Wamix*, 295 S.W.2d 873 (1956). The manipulation by the defendant law officers of this invalidated statute was and is the hallmark of bad faith arrests and charges. Appellees submit that the 10 arrests for picketing on November 3, 1966, and the 3 arrests for picketing on June 1, 1967, were inexcusable and substantially support the other proof of harassment presented by plaintiffs.

Article 5154f prohibits (1) secondary picketing, (2) secondary striking, and (3) secondary boycott. The constitutional difficulty with the secondary picketing and secondary striking provisions is their artificial, mechanical, and over-broad proscription of peaceful picketing and other legitimate activities. In both cases the statute requires a "labor dispute" as a condition of legality. The term "labor dispute" requires a controversy between an employer and the majority of his employees.

Accordingly, the secondary picketing provision prohibits peaceful picketing for perfectly lawful purposes if

the picketers are fewer in number than a majority of the employer's employees. This provision was declared unconstitutional in several decisions of the Texas Supreme Court. *Ex parte Henry,* 215 S.W.2d 588 (1948); *I.U.O.E. v. Cox,* 219 S.W.2d 787 (1949); and *General Labor Union v. Stephenson,* 225 S.W.2d 958 (1950). In these cases the Texas Supreme Court held squarely that peaceful primary picketing for a lawful purpose is constitutionally privileged even though only a minority of the employer's employees may engage in the picketing. The court also held squarely that it was a constitutional privilege of such picketers to endeavor to enlist the sympathy of others and to induce them not to cross their picket line. Indeed, in *Exparte Henry,* the primary picketing caused a railroad crew to decline to operate their train into the picketed premises. In so many words the court held at 215 S.W.2d, p. 595:

> "In this connection, it seems to be the position of respondents that since the employees of the railways would not cross the picket line manned by relators, the picketing and the consequent refusal of the railway employees to serve the employer's plant constituted such concerted action between relators and those employees as to amount to *secondary picketing and boycotting* and conspiracy in restraint of trade, *as denounced by our statutes.* Under the decisions of the Supreme Court already cited and discussed, picketing does not offend against the statutes merely because third parties who come to the area of the dispute may prove sympathetic to one disputant rather than to the other. We overrule the point." (Emphasis added)

This was the clear and undoubted state of the law as to secondary picketing and secondary boycott phases of

Article 5154f from 1948 until the defendant officers filed their criminal charges on November 9, 1966, in an effort to harass these farm workers in their peaceful primary picketing which was strictly consonant with Texas public policy. As stated, the secondary picketing provision of Article 5154f had already been declared unconstitutional in the cited cases. In an effort to circumvent these decisions, defendants arrested and charged the farm workers with aiding and abetting a "secondary strike."

The statute says that a lawful secondary strike requires a dispute which involves a majority of an employer's employees. When two employees of the Missouri Pacific Railroad respected the picket line as they approached the La Casita shed they committed the offense of "secondary strike" in that "no labor dispute" existed between Missouri Pacific and its employees. In short, these two employees were not a majority of the railroad's employees and neither was the labor dispute their own.

So, the farm workers were arrested and charged with aiding and abetting a secondary strike by the two members of the railroad crew (although, of course, the latter were not charged with anything).

As interpreted and applied by the defendant peace officers, the secondary striking provision of Article 5154f is clearly unconstitutional as the cited Texas cases demonstrate. Although the literal language of the statute justifies the arrest, only the most perversely partisan officials would try to evade the constitutional principle declared by the Texas Supreme Court that lawful primary picketing does not become unlawful merely because third parties who come to the area of the dispute may prove sympathetic to one disputant rather than the other.

This brings us to the secondary boycott phase of the statute which was invoked against 14 persons at Mission, Texas, on May 26, 1967.

The secondary boycott section prohibits any person from "aiding or abetting" a secondary boycott. In turn, a secondary boycott includes any combination, plan, agreement, or compact entered into or any concerted action by two or more persons "to cause injury or damage" "to another for whom they are not employees by:

> 1. Withholding patronage, labor or other beneficial business intercourse.
>
> 2. Picketing.
>
> * * *
>
> 4. Instigating or fomenting a strike.
>
> 5. Interfering with or attempting to prevent the free flow of commerce.
>
> 6. By any other means attempting to cause an employer with whom they have a labor dispute to inflict any damage or injury to an employer who is not a party to such labor dispute.

The Texas bible of secondary picketing and boycott law is another decision of the Texas Supreme Court, *Dallas General Drivers v. Wamix*, 295 S.W.2d 873 (1956). In that case the Texas Supreme Court upheld the legality of ambulatory picketing in certain circumstances. It also laid down the public policy of Texas relative to picketing which affects neutrals or causes employees of neutral employers to cease work. In that case Wamix employes followed their employer's concrete hauler and mixer trucks to the premises of various construction companies and by their picketing caused employees of neutral employers to engage in work stoppages.

Two lower courts had relied upon Article 5154f to enjoin the ambulatory picketing. The Texas Supreme Court, however, declined to accept these holdings. To the contrary, it said concerning Article 5154f the following:

> "Insofar as that article seeks to interdict picketing of all employers except those with whom a labor dispute exists on the part of their own employees, it offends against the Fourteenth Amendment and is unconstitutional. Construction and General Labor Union v. Stephenson, 148 Tex. 434, 225 S.W.2d 958; American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855. If picketing cannot be limited to an employer who has a labor dispute with his employees it necessarily cannot be limited to the premises of an employer."

Turning its back on the statute, therefore, the court then went to the common law to determine if the picketing of *Wamix* trucks was an incident of a secondary boycott at common law, whether it could be enjoined as such, and, finally, under what circumstances. The conclusion of the Texas court was stated at 295 S.W.2d at 884 as follows:

> "From the foregoing discussion we conclude that while secondary picketing as defined in Cain, Brogden & Cain v. Local Union No. 47, etc., supra, is contrary to the public policy of this state and subject to judicial restraint, not all picketing which has a secondary effect will be regarded as proscribed by the public policy; that two important factors in determining whether picketing in a particular case because of its secondary effect on neutral employers is proscribed by the public policy are: (a) the good faith intent of the union or striking employees in picketing a secondary situs to exert pressure only on the primary employer, to which effort the effect on neutral employers is purely incidental, and (b) the

> balancing of relative rights of all affected parties against the harm which would result to the other parties and to the public from permitting or restraining the picketing. In a hearing on a temporary injunction these matters will ordinarily address themselves to the sound discretion of the trial judge and only rarely may the issue be decided as a law question. If the Court concludes, upon evidence of probative force, that the real purpose of picketing at a secondary situs is to exert economic pressure on a neutral and it has that effect there will be no need to consider the second factor."

One of the fact findings in *Wamix* was that the ambulatory picketing was conducted for the purpose of compelling the customers of Wamix to cease doing business with it. Another finding was that the union's purpose was to induce employees of neutral employers to cease work and thereby to exert coercive pressure on neutral employers. 295 S.W.2d at 884. On this phase of the case the Texas court expressly refused to hold that all picketing which results in incidental pressure on and harm to a neutral may be enjoined. It also refused to hold that neutrals must be protected from the harmful effects of picketing in all instances and under all circumstances. 295 S.W.2d at 882. Accordingly, the public policy of Texas does not prohibit all ambulatory picketing, and it does not invalidate all picketing which causes harm or damage to a neutral. The critical test is, first, whether the union's purpose to exert pressure is directed to the primary employer and, secondly, it turns on a balancing of the relative rights of each affected party against harm or damage to the other party and to the public from permitting or restraining the picketing.

Wamix was not an isolated case. It was the studied culmination of a substantial line of Texas Supreme Court

cases which found Article 5154f a square peg for a round hole.

Cain, Brogden & Cain v. Local Union No. 47, 285 S.W. 2d 942 (1956);

General Labor Union v. Stephenson, 225 S.W.2d 958 (1950), *supra;*

I.U.O.E. v. Cox, 219 S.W.2d 787 (1949), *supra;*

Ex parte Henry, 215 S.W.2d 588 (1948), *supra.*

As to both secondary picketing and secondary boycott, Courts of Civil Appeals had reached the same result in a variety of secondary situations: *Missouri-Pacific Freight Transport Co. v. International Brotherhood of Teamsters,* 220 S.W.2d 219, ref. n.r.e.; *Texas State Optical Co. v. Optical Workers Union,* 257 S.W.2d 493, 500, ref. n.r.e.; *Teamsters v. Cain, Brogden & Cain,* 272 S.W.2d 544, reversed on common law grounds only, 285 S.W.2d 942, *supra.*

On the other hand, where the secondary boycott phase of 5154f (Section 2,e) was upheld and applied by a Court of Civil Appeals, *Construction Union v. Stephenson,* 221 S.W.2d 375, the Texas Supreme Court pointedly and expressly declined to affirm on the basis of this section. It modified and affirmed an injunction on other and quite different grounds. *General Labor Union v. Stephenson,* 225 S.W.2d 958, *supra.*

Also, *Wamix* resorted to the common law and avoided reliance upon the statute even though a recent white horse case by the Dallas Court of Civil Appeals had applied Article 5154f to ambulatory picketing of concrete trucks. *General Drivers, etc. v. Dallas County Const. Employers' Assn.,* 246 S.W.2d 677 (1951), ref. n.r.e. The latter case

was a 2-1 decision upholding the constitutionality and application of the secondary boycott and secondary picketing sections of Article 5154f to a fact situation identical to *Wamix*. While the Texas Supreme Court simply ignored the earlier case in its opinion, there is no doubt that *Wamix* is a studied refusal to accept the holding of the earlier case which, incidentally, also involved, in part, picketing at the same Wamix Company in Dallas. In both cases the same union counsel participated.

We have belabored the Texas cases for the purpose of demonstrating to this Court that Texas courts have clearly declined to perform plastic surgery on Article 5154f or to limit or construe its literal language in ways which will conform to First Amendment principles. Rather, the Texas courts have accepted the fact that the artificial and mechanical tests of the statute are fatal as written. They have reverted, therefore, to common law principles of secondary boycott so as to regulate undesirable activity by a nice balancing process in the equity court.

It is not the function of this Supreme Court of the United States to make or anticipate adjustments in the construction of state statutes when it is clearly demonstrated that state courts have adopted a different course of adjudication. State courts are as free to discard their over-broad statutes as they are to preserve them through plastic surgery.

The dragnet provisions of the secondary boycott phase of Article 5154f cannot exist contemporaneously with the *Wamix* decision. The refusal of the *Wamix* court to follow the earlier application of the secondary boycott phase of Article 5154f by the Dallas Court of Civil Appeals in an identical fact situation was striking. The same sharp refusal had occurred earlier in the *Stephenson* case, *supra*,

where the intermediate appellate court had rested its decision squarely upon the same provision.

The statute prohibits any person from "aiding or abetting" a secondary boycott. It then defines a secondary boycott to include every plan or concert of action by two or more persons to cause injury or damage to any other person for whom they are not employees by various methods.

Subparagraph (2) (the most conspicuously absurd provision) literally specifies the method of "picketing." This provision literally outlaws all picketing which may cause harm to another regardless of the circumstances or the purpose of picketing. This is *Thornhill.*

Subparagraph (1) literally specifies any plan to withhold patronage, labor or other beneficial business intercourse is unlawful (regardless of circumstance or motive). This literally means that if two persons act together to respect a picket line they commit a secondary boycott, and the picketer would be guilty of aiding and abetting them.

Subparagraph (3) was not ruled upon or involved in this case.

Subparagraph (4) literally specifies any plan by two or more persons to cause injury to another by instigating or fomenting a strike is illegal (regardless of circumstances or motive). This means that two pickets acting together commit secondary boycott if they induce another not to cross their primary picket line or if they induce other primary employees to join them and thereby harm or damage the other employer.

Subparagraph (5) specifies any plan of two persons to cause injury to another by interfering with the free flow

of commerce is illegal (without reference to the circumstances or motive). This means that any two pickets commit secondary boycott if their primary picketing induces others not to deliver or trade through the picket line.

Subparagraph (6) specifies "any other means" of causing or attempting to cause one employer to inflict damage to another (without reference to circumstances or motive). Literally this prohibits two pickets from peacefully soliciting an employer not to cross a picket line to make deliveries to another employer.

In all cases, any degree of injury or harm, however slight, suffices to make the provision applicable. These dragnet terms do not square with the reasonable precision of regulation which is the touchstone in the First Amendment area. In Subparagraph 2 the statute aims expressly at picketing and in other provisions it aims directly at the traditional inducements and persuasions which flow from picketing.

With these statutory provisions and the Texas decisions before it, the District Court correctly concluded that the statute makes irrelevant the purpose of the picketing and in sweeping terms simply prohibits anyone from aiding in harming another. Also correctly, the District Court found the statute unconstitutional under the principles enunciated in *International Brotherhood of Teamsters v. Vogt*, 354 U.S. 284 (1957). Although there is a broad field in which a state may prohibit picketing with a purpose of violating some public policy, it may not prohibit picketing for no reason at all other than the fact that public responses to that picketing may harm someone.

In the very last paragraph of the *Vogt* opinion the Supreme Court reminded again (354 U.S. pp. 294-295):

> "Of course, the mere fact that there is 'picketing' does not automatically justify its restraint without an investigation into its conduct and purposes. State courts, no more than state legislatures, can enact blanket prohibitions against picketing. Thornhill v. Alabama and A.F.L. v. Swing, supra. In this case, the circumstances set forth in the opinion of the Wisconsin Supreme Court afford a rational basis for the inference it drew concerning the purpose of the picketing. No question was raised here concerning the breadth of the injunction, but of course its terms must be read in the light of the opinion of the Wisconsin Supreme Court, which justified it on the ground that the picketing was for the purpose of coercing the employer to coerce his employees."

Fitting in with the principles of *Vogt* is *Organization for a Better Austin v. Keefe, supra.* "The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment." 402 U.S. at 419. Under these authorities, the dragnet provisions of the Secondary Boycott phase of Article 5154(f) cannot stand since they prohibit solely because there is damage or harm without reference to the purposes or circumstances which may be involved in the case.

Of course, the Supreme Court will understand that the judgment in this case does not alter the law of Texas as to secondary picketing, secondary striking, or secondary boycott. It merely stops the defendant officers from arresting under this obsolete and invalidated statute.

Plaintiffs did not ask for much in this instance. *Wamix* is a demanding decision, the virtue of which is not that it freely allows secondary pressures but that it provides for hearings and for balancing to be done by equity courts to protect all parties and the public. The real relief which

plaintiffs obtained was rescue from erratic arrests and prosecution at the hands of unfriendly law officers.

Any public official who desires to seek an elucidating and limiting construction to revive and save portions of Article 5154f can institute suit for injunction under Section 5 of Article 5154f. So can any private party under Section 4.

Also, we may surmise that the Texas Supreme Court might have reshaped the statute by limiting construction or by plastic surgery. As the matter now stands, however, we have here a case of a generalized over-broad statute applied to a constitutionally protected situation. "[A] generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between constitutionally permissible and constitutionally impermissible applications of the statute." *Wright v. Georgia,* 373 U.S. 284, 292 (1963).

In the much respected, often cited article by Professor Amsterdam in 109 Pa. L.R. 67 (1960) the point is made that withdrawal by a state court under an over-broad statute to the line of absolute constitutional prohibition does not satisfy either the requirement of fair warning or the need for tolerance in the Bill of Rights area. 109 Penn. L.R. p. 80. Amsterdam referred to two illustrative cases, *Smith v. Cahoon,* 283 U.S. 553 (1931) and *Herndon v. Lowery,* 301 U.S. 242 (1937). In the former case, Florida enacted a regulatory scheme to cover all truckers, private and common, but not all of its many aspects could constitutionally cover private carriers. When the constitutionalty of the licensing portion of

the statute was challenged as applied to private carriers, the Florida court upheld this particular licensing application then went on to hold that ". . . the provisions of the statute that are legally applicable only to common carriers are not intended to be applied to and are not applicable to . . ." private carriers. The Florida court then left the other applications of the sections of the statute to be worked out from time to time as the then prevailing pressures of substantive due process might dictate. This was held bad. Curing the potential substantive due process infirmities did not answer the indefiniteness risks for the private carrier. "The legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and thus resolving important constitutional questions . . ." 283 U.S. p. 564.

In *Herndon v. Lowery,* supra, defendant was rescued from a Georgia insurrection statute making unlawful "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the state." The Georgia court defined the causal connection between the persuasion and the reaction to be limited to "a reasonable time". The Supreme Court found this unacceptable because no one could ascertain when his utterance might beget the prohibited resistance to the state. At the same time the jury was licensed to create its own standard in each case.

In the absence of clarifying constructions of the Texas Supreme Court to define the correct and constitutional scope of the statute, its terms in the light of its use by the defendant law officers render it unconstitutionally vague. No one can reasonably know what the statute prohibits or does not prohibit.

For all of the above reasons, Appellees submit that the judgment of the district court was correct as to Article 5154f.

CONCLUSION

The district court correctly applied the tests of *Younger v. Harris* (although no interference with pending criminal prosecutions was requested or granted).

The challenged statutes are unconstitutional, and the judgment of the district court was correct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Chris Dixie, a member of the Bar of the Supreme Court of the United States, do hereby certify that appropriate copies of the foregoing Appellees' Brief have been served on counsel for appellants by depositing same in the United States mail, certified, postage prepaid, addressed to Hon. John L. Hill, Attorney General of Texas, and Hon. Gilbert J. Pena, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on this the _____ day of August, 1973.

CHRIS DIXIE

APPENDIX TO APPELLEES' BRIEF

Art. 5153. Other Rights and Privileges

It shall be lawful for any member or members of such trades union or other organization or association, or any other person, to induce or attempt to induce by peaceable and lawful means, any person to accept any particular employment or to enter or refuse to enter any pursuit or quit or relinquish any particular employment or pursuit in which such person may then be engaged. Such member or members shall not have the right to invade or trespass upon the premises of another without the consent of the owner thereof.

Article 5154b. Liability of labor organizations for damages

Section 1. A labor organization whose members picket or strike against any person, firm or corporation shall be liable in damage for any loss resulting to such person, firm or corporation by reason of such picketing or strike in the event that such picketing or strike is held to be breach of a contract by a Court of competent jurisdiction.

Art. 5207a § 1

The inherent right of a person to work and bargain freely with his employer, individually or collectively, for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

Excerpts from Attorney General's Post Hearing Brief to the District Court.

"On this occasion [October 12, 1966] in addition to being charged with disturbing of the peace, all persons present could have been charged with violation of Article 482, Abusive Language, violation of Articles

439 and 449, Unlawful Assembly. If charges had been made under Articles 455, 464, 466, and under Article 468, all persons present would have been guilty of rioting as all would have been guilty of rioting as all would be guilty if anyone present performed an illegal act." (pp. 15-16)

"In the next scene, *Paragraph 7.11,* [January 26, 1967] Plaintiffs offered no evidence to rebut the fact that they were using a loud speaker and calling to Augustine Lopez and Fredrico Pena and other workers by using 'the foulest words known to that language in this area. * * * Assuming the correctness of this uncontroverted testimony, Plaintiff could clearly have been charged under Articles 482, Abusive Language; 439, 449 Unlawful Assembly; 455, 464, 466, 469, Rioting Statutes; and 5154d, V.C.S." (p. 20)

"* * * [On January 26, 1967 at the Courthouse] the entire crowd could have been arrested and charged with unlawful assembly under the P. C., Articles 439, 449; for Rioting, P. C., Articles 455, 466; for Disturbing the Peace, P. C., Article 482, Abusive Language." (pp. 21-22)

"On February 1, 1966, the instance complained about in *Paragraph 7.13* occurred. In reviewing the record, there is some doubt as to whether or not Penal Code, Article 474 applies. Based on the testimony of the two Catholic priests, Father Smith and Father Killian, everyone present could have been charged with violation of Article 5154d, Mass Picketing, with Articles 439 and 449, Unlawful Assembly; and possibly under Article 482, Abusive Language, as Father Smith stated that they were calling the workers 'scab' in Spanish in attempting to use the word that has 'punch to it and an edge to it.' " (p. 22)

"*Paragraph 7.18* complains of the arrest [On May 18, 1967] of twenty-one pickets at the entrance of Trophy Farm. * * * Charges could have likewise been filed for rioting and unlawful assembly." (pp. 25-26)

"At the time and place in question [On May 26, 1967] both those initially arrested and those arrested in the secondary group were clearly guilty of Unlawful Assembly Under Articles 439 and 449 of the Penal Code and of Rioting under Articles 455, 464, and 466. * * * It is interesting to note that in spite of protestations of innocence, each of the person arrested had participated in union activity, were away from their homes with the intention of aiding and lending support to the unlawful assembly and riot at Mission, Texas. It is immaterial under State law whether or not they were actually standing on the railroad tracks themselves or merely near to the tracks or even if they were somewhere else if they were or had been a part of this unlawful assembly." (pp. 30-32)

"In *Paragraph 7.21*, complaint is made of the arrest [On May 31, 1967] union members who were talking to workers in the field through a loud speaker. * * * In addition on this occasion, participants could have been charged with violation of Articles 439, 449, Unlawful Assembly; Articles 474, Disturbing the Peace; and Article 482, Abusive Language, Articles 455, 464, or 466 of the rioting statute." (pp. 33-34)

"In *Paragraph 7.16*, * * * Diaz was speeding up and passing the bus, and then slowing it down so that it could not proceed. * * * A valid charge of Unlawful Assembly, Articles 439 and 449 or Rioting, Articles 455 and 464 could have been filed against all persons in the car." (pp. 23-24)